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No. 1243

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

BROADWAY ENTERPRISES, INC.,
Petitioner,

vs.

BOARD OF LIQUOR CONTROL,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1245

BROADWAY ENTERPRISES, INC.,
Petitioner,

vs.

BOARD OF LIQUOR CONTROL,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

QUESTION PRESENTED

May the State of Ohio, consistent with the Constitution of the United States, require, as a condition of the privilege of carrying on the retail liquor business, that Ohio liquor permittees hold their licensed permit premises open to inspection, including the taking of samples of liquor stock therefrom to a state laboratory for chemical anaylsis, by agents of the Ohio Department of Liquor Control?

STATUTES INVOLVED

OHIO REVISED CODE

§ 4301.10 Powers and duties of department of liquor control.

(A) The department of liquor control shall:

(1) Control the traffic in beer and intoxicating liquor in this state, including the manufacture, importation, and sale thereof:

• • • • • • • • •

(4) Enforce Chapters 4301. and 4303. of the Revised Code, and the rules, regulations, and orders of the board, the director, and the penal laws relating to the manufacture, importation, transportation, distribution, and sale of beer and intoxicating liquors; and the attorney general, any prosecuting attorney, and any prosecuting officer of a municipal corporation or a police or municipal court, shall at the request of the department prosecute any person charged with the violation of such chapters or of any section of the Revised Code relating to the manufacture, importation, transportation, distribution, and sale of beer and intoxicating liquor;

• • • • • • • • •

(6) Inspect, upon demand, the books, accounts, records, memorandums, and place of business of any person subject to Chapters 4301. and 4303. of the Revised Code or the laws relating to the manufacture, importation, transportation, distribution, and sale of beer and intoxicating liquor, and the sale of alcohol;

(7) Delegate to any of its agents or employees any power of investigation which the department possesses and the powers of police officers with respect to the enforcement of any of the penal laws relating to beer and to intoxicating liquor, provided that except in his report to the department

or when called upon to testify in any court or proceeding, no such agent or employee shall divulge any information acquired by him with respect to the transactions or the business of any person while acting as such agent or employee, and if he does divulge such information he shall be disqualified forever from acting as agent or in any other capacity under the appointment or employment of the department;

(8) Exercise all other powers expressly or by necessary implication conferred upon the department by Chapters 4301. and 4303. of the Revised Code, and all powers necessary for the exercise or discharge of any power, duty, or function expressly conferred or imposed upon the department by such chapters.

• • • • • • • • •

§ 4301.25 Suspension or revocation of permit.

The board of liquor control may suspend or revoke any permit issued pursuant to Chapters 4301. and 4303. of the Revised Code for the violation of any of the applicable restrictions of such chapters or of any lawful rule or regulation of the board or other sufficient cause, and for the following causes:

(A) For conviction of the holder or his agent or employee for violating a section of Chapters 4301. and 4303. of the Revised Code or for a felony;

(B) For making any false material statement in an application for a permit;

(C) For assigning, transferring, or pledging a permit contrary to the rules and regulations of the board;

(D) For selling or promising to sell beer or intoxicating liquor to a wholesale or retail dealer who is not the holder of a proper permit at the time of the sale or promise;

(E) For failure of the holder of a permit to pay an excise

tax together with any penalties imposed by the law relating thereto and for violation of any rule or regulation of the department of taxation in pursuance thereof.

§ 4301.66 Obstructing search of premises prohibited.

No person shall hinder or obstruct any agent or employee of the department of liquor control, or any officer of the law, from making inspection or search of any place, other than a bona fide private residence, where intoxicating liquor is possessed, kept, sold, or given away.

§ 4301.68 Prohibition against sale or possession of diluted liquor and refilled containers.

No person shall sell, offer for sale, or possess intoxicating liquor in any original container which has been diluted, refilled, or partly refilled.

STATEMENT OF THE CASE

This case originated with a charge before the Ohio Board of Liquor Control that Petitioner had possessed upon its licensed liquor permit premises intoxicating liquor in original containers which had been diluted, refilled, or partially refilled in violation of Section 4301.68 of the Ohio Revised Code. Petitioner made timely objection to the admission before the Board of certain evidence and testimony relative to several allegedly refilled whiskey bottles which had been taken without objection from Petitioner's permit premises by state liquor investigators for chemical analysis. Petitioner's objections were overruled; and, upon hearing and an affirmative finding as to the violation alleged, the Board ordered Petitioner's Ohio liquor permit privileges suspended for a period of seventy days (Petition, Appendix A).

Petitioner thereafter prosecuted an appeal to the Court of Common Pleas of Franklin County which affirmed the

order of the Board of Liquor Control (Petition, Appendix B). On further appeal by Petitioner to the Court of Appeals of Franklin County the decision of the Court of Common Pleas was affirmed (Petition, Appendix C (Opinion), Appendix D (Journal Entry)).

Petitioner then sought to appeal to the Supreme Court of Ohio, but on December 1, 1965 its motion for an order directing the appellate court to certify its record for review was overruled. Rehearing was subsequently denied and the present Petition for Writ of Certiorari was filed in this Court.

REASONS FOR DENYING THE WRIT

It should be noted at the outset that this case is a near relative of *Solomon v. Liquor Control Commission*, No. 1132, Oct. Term 1965, cert. denied May 2, 1966. Both involved action by the Ohio Board of Liquor Control or its statutory successor, the Liquor Control Commission, under authority of Section 4301.25, Ohio Revised Code, for violation of Section 4301.68, Ohio Revised Code. In each case there were timely objections to the use in evidence before the administrative agency of information obtained from bottles of intoxicating liquor which had been removed by state agents from the liquor permit premises to a state laboratory for testing and analysis. Such objections were overruled in each case and in both the order of the administrative agency was affirmed at the first appellate level.

On appeal to the Court of Appeals of Franklin County, the administrative agency's order in this case was affirmed (1 Ohio App. 2d 470 (Aug. 11, 1964), 205 N.E. 2d 100); while the order in *Solomon* was reversed (3 Ohio App. 2d 140 (Sept. 22, 1964), 209 N.E. 2d 742). The difference between the two results is not discussed at any length in the two opinions. Based upon the facts of the two cases, how-

ever, it would appear to arise, at least in part, from the fact that the record in this case indicates prior complaint and a hydrometer test[1], establishing the probability of a violation, before any bottles of intoxicating liquors were removed to the state laboratory for analysis. The record in the *Solomon* case does not indicate such prior complaint or testing. It would seem that the court felt the liquor agents had authority under the state statute to remove samples of the stock of intoxicants in the former circumstances but not in the latter.

In any event, the question of the extent of authorization under Ohio law for removal of bottled intoxicants from a liquor permit premises by state liquor agents for testing in a state laboratory was settled by the Supreme Court of Ohio on December 1, 1965,, when it reversed the lower court's decision in the *Solomon* case (4 Ohio St. 2d 31) and, on that same day, declined to review the lower court's decision affirming the Liquor Board's order in the present case. As pointed out above, this Court has already denied Certiorari in the *Solomon* case.

As in the *Solomon* Petition, there is in the present one an effort to convince the Court that the question of whether the exclusionary evidence rule of *Mapp v. Ohio*, 367 U.S. 643 (1961), is applicable to state administrative proceedings is presented here. In fact and despite Petitioner's use of phrases such as "highhanded manner", "official lawlessness" and "flagrant abuse", that question is not presented, for it necessarily presupposes an unlawful search and seizure that simply does not exist in this case, any more than it did in the *Solomon* case.

The State of Ohio may, consistent with the Constitution of the United States, require, as a condition of the privilege

1. Effective only where dilution or refilling has been done with a liquid of a different alcoholic proof and not, for instance, where a different whiskey of the same proof has been used.

of carrying on the retail liquor business in the state, that such liquor permittees hold their licensed permit premises open to the type of inspection carried out in this case.

The key portion of the holding of the Ohio Supreme Court in *Solomon v. Liquor Control Commission*, supra, is contained in Syllabus No. 4 to the court's opinion.

> "One who applies for and is issued a permit to sell intoxicating beverages thereby subjects himself to the provisions of the Liquor Control Act and assents to the reasonable exercised inspection and examination by the agents of the Department of Liquor Control of his permit premises, including bottled intoxicants which he possesses and offers for sale thereon, and a removal of bottles of intoxicants from the permit premises by such agents for examination and testing in a state laboratory to determine whether they comply with lawful requirements is authorized by the provisions of the Liquor Control Act."

That is the highest court of Ohio speaking as to the meaning of an Ohio statute, the Ohio Liquor Control Act and especially Section 4301.10 of the Ohio Revised Code (see Syllabus No. 2). Such construction of the Ohio statute is binding upon this Court (*United States v. Burnison*, 339 U.S. 87 (1950); *Oklahoma Tax Commission v. Texas Company*, 336 U.S. 342 (1949); *Kingsley International Pictures Corp. v. Regents of University of New York State*, 360 U.S. 684 (1959); *National Asso., for Advancement of Colored People v. Button*, 371 U.S. 415 (1963)). In effect, the Ohio Supreme Court has said that it is a statutory condition of holding an Ohio liquor permit that the permittee agree to reasonable inspection and examination of his permit premises, including the removal of bottled intoxicants therefrom for testing in the state laboratory. Unless there is a substantial question whether Ohio may, consistent with the Constitution of the United States, have such a law, there is nothing for this Court to review; for otherwise Petitioner's case presents no federal question.

It has long been settled that ". . . on account of their well known noxious qualities and the extraordinary evils shown by experience commonly to be consequent upon their use, a state has the power absolutely to prohibit manufacture, gift, purchase, sale, or transportation of intoxicating liquors within its borders without violating the guaranties of the 14th Amendment." (*Crane v. Campbell*, 245 U.S. 305, 307 (1917)) "Having the power absolutely to prohibit manufacture, sale, transportation, or possession of intoxicants . . ." a state may, if it chooses, permit these things only under definitely prescribed conditions. "The greater power includes the less . . . The state may protect her people against evil incident to intoxicants . . . and may exercise large discretion as to the means employed." (*Ziffrin v. Reeves*, 308 U.S. 133, 138, 139 (1939))

In the present case the State of Ohio has deemed it in the interest of her people to require that those places licensed to sell intoxicants be open to the type of inspection carried out here. The Supreme Court of Ohio has so interpreted the Ohio law. Petitioner argues strenuously that this is an invasion of Constitutional rights, but it is not. Petitioner has no Constitutional right to carry on the liquor business (*Giozza v. Tierman*, 148 U.S. 657 (1893)); it can, therefore, hardly have a Constitutional right to carry it on free from inspection.

Petitioner's arguments based upon the fact that violation of Section 4301.68, supra, might also be treated as a misdemeanor and that obstructing an inspection of a permit premises may also be an offense under Section 4301.66, Ohio Revised Code, are inapposite. No criminal penalty is being imposed in this case, nor is there any charge of improperly obstructing an inspection, and the Court does not "decide any constitutional question except with reference

to the particular facts to which it is to be applied . . ." (*Alabama State Federation of Labor v. McAdory*, 325 U.S. 450, 461 (1945)). The particular facts with reference to which any Constitutional question would be decided here are suspension of a state retail liquor permit upon evidence of a violation of state liquor law, obtained in an unobstructed inspection of the liquor permit premises, authorized by, and made a condition of obtaining a permit under, the state liquor law.

Nothing is in jeopardy here but the privilege of Petitioner's Ohio liquor permit—not life, nor liberty, nor property (*State ex rel. Zugravu v. O'Brien*, 130 Ohio St. 23 (1935)). Furthermore, the right of inspection which the state acquired when Petitioner obtained its permit does not infringe its Constitutional rights, for it extends only to Petitioner's licensed permit premises and the things thereon—not to home, nor car, nor person. The present case deals with nothing more than the privileges of a state liquor license; and the statutory right of inspection, here producing the evidence upon which that privilege was suspended, extended no further than the site where the privilege was then being exercised. Such a state of facts discloses no invasion of the Constitutional rights of Petitioner.

CONCLUSION

Petitioner's case presents no federal question of substance for review by this Court. The writ prayed for should, therefore, be denied.

Respectfully submitted,

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